MOHAMED MOIDU MOHAMED & ANOR

v.

HASSAN KADIR & ORS (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-205-1996]
13 APRIL 2001

LAND LAW: *Indefeasibility of title and interests - Deed of sale and irrevocable power of attorney - Whether terms of deed of sale a binding agreement - Power of Attorney Act 1949 - Whether right of plaintiffs under deed of sale jeopardised - Whether defendants bona fide purchasers or mere volunteers - Whether defendants' title to land defeasible - Whether plaintiffs entitled to be registered as co-proprietors*

LAND LAW: *Indefeasibility of title and interests - Registered charge - Plaintiff's portion of land transmitted to defendants after death of deceased - Defendants as registered owners of land pursuant to distribution order - Small Estates (Distribution) Ordinance 1955 - Whether defendants hold portion as constructive trustees - Whether defendants' title to land defeasible - Whether plaintiffs entitled to be registered as co-proprietors*

LAND LAW: *Indefeasibility of titles and interests - Fraud - Whether plaintiffs subjected to prove fraud, misrepresentation, forgery or unlawful acquisition - National Land Code 1965, s. 340(2)(a), (b), (c) - Whether plaintiffs entitled to be registered as co-proprietors*

The plaintiffs' claim in this case was based on a deed of sale and irrevocable power of attorney ('the deed of sale') whereby the plaintiff had purchased a portion of land ('the portion') of a land ('the land') from the deceased. The deceased was the father of all three defendants herein ('the defendants'). Pursuant to the deed of sale, the plaintiffs had duly paid the consideration of RM42,000 being the full purchase price and had entered into possession of the portion.

Upon the death of the deceased, the defendants as beneficiaries were granted a distribution order under the Small Estates (Distribution) Ordinance 1955 ('the distribution order') whereupon the land including the portion was transmitted to the defendants as registered owners in equal shares.

Subsequently, the plaintiffs approached the defendants to effect the transfer of the portion to the plaintiffs but this was refused by the defendants. The plaintiffs followed up with an application to vary the distribution order to include the plaintiffs in the ownership over the portion but it was rejected. Hence, this present action.

The issues that arose: (1) whether there was a binding agreement upon the terms of the deed of sale; (2) whether the defendants were constructive trustees for the plaintiffs in holding the portion; (3) whether pursuant to the distribution order the registration of title to the land in the defendants' name was indefeasible; and (4) whether the plaintiffs were entitled to be registered as co-proprietors of the land.

Held:

[1] The deed of sale was duly executed by the parties, stamped and registered with the High Court. The evidence of due execution by the parties was supported by the evidence of the Commissioner of Oaths who had witnessed the execution by the parties of the deed of sale. Thus, the deed of sale had fulfilled all the requirements of the Power of Attorney Act by reason of its authentication. There was a binding agreement upon the terms of the deed of sale.

[2] The cumulative effect of the express wording of the various clauses of the deed of sale clearly established that the true intention of the parties was to effect a sale of the portion to the plaintiffs.

[2a] The plaintiffs have pursuant to the deed of sale acquired rights *ad rem* over the portion. Although the deceased had passed away and there was devolution of the estate to the defendants as beneficiaries, the rights and constructive trust of the plaintiffs are not jeopardised. Thus, as the plaintiffs had acquired rights *ad rem*, and pending registration of the portion into their names, the deceased, and by devolution the defendants holds the portion as constructive trustees for the plaintiffs.

[2b] The interest acquired by the plaintiffs pursuant to the deed of sale, survived the death of the defendants' father and the transmission of the land to the defendants is subject to all the equities created by the deed of sale and the defendants were legally bound to honour the equities so created.

[3] The defendants were volunteers by reason of the registration of the title into their names being through devolution. They could not be termed as *bona fide* purchasers for value for the reason that no consideration emanates in the devolution. In such a situation their title to the land

was defeasible by the equitable interests created and subsisting by the deed of sale and as such, their ownership could not fall within the rule of indefeasibility as envisaged under s. 340(1) of the National Land Code, 1965 ('NLC'). The interest created was an interest arising by operation of law and recognisable by s. 340(b) of the NLC and hence the plaintiffs could not be subjected to prove fraud, misrepresentation, forgery or unlawful acquisition as prescribed by s. 340(2)(a)(b) and (c) of the NLC in enforcing their statutorily recognisable interests as the interests so created was over and above the statutory exceptions.

[4] The sum total of the prohibitory provisions of ss. 205(3) and 205(4) would have the effect of prohibiting the plaintiffs from the relief sought of effecting registration of themselves as co-proprietors of the land herein which was categorised as agricultural land. But in the interest of justice, the court must come to the aid of the plaintiffs more so in light of the findings of the equitable interests by way of trusts created and subsisting under the deed of sale.

[5] As the defendants do hold the land subject to the constructive trusts created in favour of the plaintiffs pursuant to the terms of the deed of sale and irrevocable power of attorney and pursuant to s. 417 of the NLC the registrar of titles or the land administrator is to cause an endorsement to be entered on the register of titles of the trust aforesaid in favour of the plaintiffs.

[Order accordingly; costs of action to be taxed and paid by the defendants to the plaintiffs.]

Case(s) referred to:

Alfred Templeten & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 ***(refd)***

Bachan Singh v. Mahinder Kaur & Ors [1956] MLJ 1997 ***(refd)***

Curtis v. Chemical Cleaning & Dying Co Ltd [1951] 1 All ER 631 ***(refd)***

Hj Osman Abu Bakar v. Saiyed Noor [1952] MLJ 37 ***(refd)***

Itam Saad v. Chik Abdullah [1974] 2 MLJ 53 ***(refd)***

Karthiyayani & Anor v. Lee Leong Sia & Anor [1975] 1 MLJ 119 ***(refd)***

Kersah La'usin v. Sikin Manan [1966] 2 MLJ 20 ***(refd)***

Krishnadas Achutan Nair v. Maniyam Samykano [1997] 1 CLJ 636 ***(refd)***

Lian Keow Sdn Bhd (in Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 ***(refd)***

Mohd Mustafa v. Kandasami [1979] 2 MLJ 109 ***(refd)***

Munah v. Fatimah [1968] 1 MLJ 54 ***(refd)***

Ng Kheng Yeow v. Chuah Ah Foo & Ors [1987] 2 MLJ 330 ***(refd)***

Ong Chat Pang v. Valiappa Chettiar [1991] 1 MLJ 224 ***(refd)***

Ooi Yoke In (F) & Anor v. Public Finance Berhad [1993] 2 CLJ 469 ***(refd)***

Runin Pangau v. Gerada (f) Bana [2000] 4 AMR 445 ***(refd)***

Williams v. Greatrex [1957] 1 WLR 31 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 136, 205(3), (4), 206, 207, 212, 214(1), 297, 304, 340(1), (2)(a)(b), (c), (4)(b), 342(1), 343, 347(2), 417
Power of Attorney Act 1949, s. 6

Other source(s) referred to:
David Wong, *Tenure and Land Dealing in the Malay States*
G Raman, *Probate and Administration in Singapore and Malaysia: Law and Practice*, p 127
Judith Sihombing, *National Land Code, A Commentary*, 2nd edn, p 797
KS Das, *Torrens System in Malaya*, p 359
Osborn's Law Dictionary

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For the defendant - Mathews George; M/s Danaraj Mathews Jimmy & Sara; M/s A Rahim & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Syed Ahmad Helmi JC:

This case concerns a dispute over the proprietary rights over a portion of land purchased by the plaintiffs from the father of the defendants which the defendants refused to transfer and effect registration into the names of the plaintiffs as co-owners of the land in question.

The plaintiffs' claim as appears by the statement of claim is based on a deed of sale & irrevocable power of attorney dated 7 October 1978 (hereinafter called the "deed of sale") whereby the plaintiffs purchased an area of approximately 21,000 square feet (hereinafter called "the portion") of the land measuring an area of 1 acre 3 roods 30 poles held under GM 482 (previously known as EMR 381) Lot 261, Mukim Plentong Daerah Johor Bahru (hereinafter called "the land") from one Abdul Kadir Ahmad since deceased (hereinafter called the deceased) and who was the father of all three defendants herein. Pursuant to the deed of sale the plaintiffs duly paid the consideration of RM42,000 being the full purchase price and entered into possession of the portion.

The deceased passed way on 17 November 1978 and the three defendants herein as beneficiaries applied for and was granted a distribution order by the collector under the Small Estates (Distribution) Ordinance 1955 on 20 April 1982 (hereinafter called the distribution order) whereupon the land including the portion was transmitted to the defendants as registered owners in equal shares.

The plaintiffs approached the defendants sometime in 1986 to effect a transfer of the portion to him as they intended to construct a shophouse on the portion but was refused by the defendants. The refusal by the defendants resulted in the plaintiffs lodging in a private caveat on the land on 13 January 1986 to protect their interests. The plaintiffs followed up with an application to vary the distribution order to include the plaintiffs ownership over the portion but it was rejected.

The plaintiffs thereafter pursued their claim through Johor Bahru High Court Originating Summons No. 24-522-1989 but owing to non-compliance with the consent order to convert the originating summons to writ action, the plaintiffs obtained leave of court on 8 October 1996 to withdraw the originating summons with liberty to file a fresh - hence this present writ action.

The plaintiffs claim as appears in the statement of claim herein is in the alternative based on the deed of sale. The principal prayer is for specific performance of the deed of sale and for the defendants to transfer the said portion to the plaintiffs as co-owners of the land. The alternative prayer relates to a declaration that the plaintiffs are entitled to the portion under the deed of sale and the defendants as trustees thereof do transfer the portion to the plaintiffs and be made the registered co-owners of the land.

The defendants in their defence averred that the plaintiffs have no beneficial nor equitable interest on the said portion and denied that they held the portion as constructive trustees for the plaintiffs and consequently they were not duty bound to transfer the said portion to the plaintiffs. The defendants maintained that they had no knowledge of the deed and that the plaintiffs has slept on their rights (if any) and by reason thereof they are not entitled to the reliefs sought.

The defendants further maintained that by reason of the fact that the registration of the title is in the names of the defendants pursuant to the distribution order dated 20 April 1982 which distribution order was obtained without the defendants being aware or seised with knowledge of the plaintiffs' interest, the defendants cannot be said to exercise fraud as claimed by the plaintiffs.

As the plaintiffs' claim is founded on the deed of sale the true intention of the parties are to be gained from the document itself - *Mohd Mustafa v. Kandasami* [1979] 2 MLJ 109 and I shall now turn to the evidence presented.

On the due execution of the deed of sale the first plaintiff (SP3) in his evidence stated that the father of the defendants, Abdul Kadir Ahmad since deceased executed the deed of sale in the presence of the Commissioner of Oaths, Mustaffa Mohamed (SP1) at the Johor Bahru High Court.

The plaintiffs also executed the deed of sale in the presence of SP1 who attested his signature as attesting witness to the document. It was SP3's evidence that the total purchase price of RM42,000 had been paid to the deceased prior to the execution of the deed of sale.

Thereafter the plaintiffs entered into possession of the portion but encountered some problems with an occupier on the portion, one Abdul Aziz which necessitated the plaintiffs initiating legal action and culminated in an agreement whereby the said Abdul Aziz vacated the area occupied by him on the said portion.

It was the first plaintiff's case that the delay in developing the portion was occasioned by insufficient funds and the protracted problem with Abdul Aziz and only after resolution of same did he decide to develop the portion into a shophouse sometime in 1986. It was at this stage that he approached the defendants to include his name in the title so as to enable him to proceed with the development of the shophouse and after the defendants rebuffed him he lodged a private caveat on 13 January 1986.

Thereafter the first plaintiff on 5 October 1987 applied to the Pegawai Pentadbir Tanah to vary the distribution order made on 20 April 1982 to exclude the portion and transfer the portion into their names. The first plaintiff's application was rejected by the Pegawai Pentadbir Tanah on the grounds that they have no powers to vary the distribution order and only the courts have the necessary powers. By reason thereof the plaintiffs are now seeking the reliefs claimed in the present action.

Having perused the evidence of SP3 I am of the considered view that there is a binding agreement upon the terms of the deed of sale. The deed of sale was duly executed by the parties therein, stamped and registered with the High Court. The evidence of due execution by the parties was supported by the evidence of SP1 Mustaffa Mohamed the commissioner of oaths who witnessed the execution by the parties of the deed of sale. I have carefully scrutinised the evidence of SP1 and I have no hesitation in accepting his evidence as to the due execution of the agreement by the parties. SP1 is an independent witness and his testimony is accepted by this court. As was stated by his Lordship Raja Azlan Shah FJ (as His Majesty then was) in *Karthiyayani & Anor v. Lee Leong Sia & Anor* [1975] 1 MLJ 119 at p. 20 para D:

> If a witness is independent i.e. if he has no interest in the success or failure of a case and his evidence inspires confidence of the Court such evidence can be acted upon.

An attempt was made by counsel for the defendant to challenge the deed of sale in that the contents of the agreement was not explained to the deceased

in Malay as he was illiterate. I have no hesitation in rejecting such a suggestion because though SP1 states that he cannot remember whether he explained the contents of the agreement nevertheless I accept his testimony that as commissioner for oaths he was under a duty to explain the contents. In any event the law is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, binding them (so to speak) then, to borrow the words of Denning J in the case of *Curtis v. Chemical Cleaning & Dying Co Ltd* [1951] 1 All ER 631:

> his signature is irre-fragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

As was aptly put by His Lordship Dato' Abdul Malik Hj Ishak in *Ooi Yoke In (F) & Anor v. Public Finance Berhad* [1993] 2 CLJ 469:

> In short, when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial, (1) whether he has read the document or not (2) whether he knows no English and the contents were not explained to him.

I would also like to emphasise that the deed of sale has fulfilled all the requirements of the Power of Attorney Act by reason of its authentication before a commissioner for oaths (SP1) and deposited and duly registered in court. The power of attorney granted was expressed to be for valuable consideration and hence under s. 6 of the Power of Attorney Act it cannot be revoked and furthermore there is no evidence of revocation here.

Having established the validity of deed of sale I now come to the question of the nature of the interests created by the deed.

It is the plaintiffs' case that the deed of sale is what it says namely the sale of the portion by the deceased to the plaintiffs upon the terms and conditions as stated therein. The defendants contend that the deed of sale is nothing more than to confer occupational rights for his lifetime.

The applicable principle in the construction of documents as established by the Federal Court in *Mohd Mustafa v. Kandasami* [1979] 2 MLJ 109 is that where there is a written agreement, the true intention of the parties is to be gained from the document itself.

Upon a careful analysis of the terms of the agreement as expressed therein I have no hesitation in concluding that it was an out and out agreement for sale of the portion. The recitals in the preamble identifies the land, the portion and the sale consideration of RM42,000. The deed of sale then goes on to expressly state that "in consideration of the sum of RM42,000 (Dollars Forty

Two Thousand) only the receipt whereof the vendor hereby acknowledges in full being the agreed purchase price of the aforesaid premises, *the vendor do hereby transfer, assign and convey all his rights, title and interest in the said portion of the property free from all encumbrances To Hold the same unto the purchasers absolutely*. (emphasis mine).

The deed of sale then provides by cl. 2 thereof that the purchasers "shall have possession and occupation of the said portion of the property and shall be at liberty to use and administer same in any manner they choose and deem fit and to execute all the rights of exclusive ownership over the said portion of the property".

The deed of sale then concludes by granting the irrevocable power of attorney to the plaintiffs. The cumulative effect of the express wording of the various clauses of the deed of sale clearly establishes that the true intention of the parties therein was to effect a sale of the portion to the plaintiffs.

Having ascertained that the deed of sale is a sale of a portion the corollary question that arises is what are the rights acquired by the plaintiffs under the deed of sale and whether the rights acquired therein would be defeated by reason of the registration of the land in the names of the defendants.

Upon a valid sale and agreement being executed the plaintiffs herein have acquired rights *ad rem* over the portion. So long as he is in possession he does not lose his right simply by not proceeding at once for specific performance - *Kersah La'usin v. Sikin Manan* [1966] 2 MLJ 20; *Itam Saad v. Chik Abdullah* [1974] 2 MLJ 53; *Munah v. Fatimah* [1968] 1 MLJ 54.

His Lordship Raja Azlan Shah (as His Majesty then was) in *Kersah La'usin v. Sikin Manan* quoted at p. 22 thereof the dictum of Thomson J in *Bachan Singh v. Mahinder Kaur & Ors* [1956] MLJ 1997:

> Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right in personam.

And at p. 23 he quoted Denning LJ in *Williams v. Greatrex* [1957] 1 WLR 31:

> ...once the purchaser went into possession of the land having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.

Even though the vendor has passed away and there is devolution of the estate to the defendants herein as beneficiaries - the rights and the constructive trust interest of the plaintiffs under the deed of sale are not jeopardised. As was stated by his Lordship Syed Agil Barakbah SCJ at pp. 463-464 in *Lian Keow Sdn Bhd (in Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449:

> The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust ... . Prior to the registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as a constructive trustee.

In the light of the above it is my judgment that the plaintiffs herein have pursuant to the deed of sale acquired rights *ad rem* over the portion and pending registration of the portion into their names the defendant's father and by devolution the defendants herein holds the portion as constructive trustees for the plaintiffs.

Having established the nature of the interests acquired by the plaintiffs I shall now address the question of whether the registration of the land into the names of the defendants through the distribution order makes their title indefeasibility and not challengeable by the plaintiffs herein and the determination of same would involve an analysis of the provision of s. 340 of the National Land Code which governs indefeasibility of title.

The concept on indefeasibility through registration is expressly spelt out by s. 340 of the National Land Code 1965 and it is achieved under s. 297 thereof by the registration of an instrument of dealing in the statutory form which has been executed attested and determined fit for registration by the registrar.

Though registration confers indefeasibility nevertheless it is not without exceptions and the statutory exceptions are spelt out in s. 340(2) which provides:

> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any writen law.

Judith Sihombing in her book entitled *"National Land Code, A Commentary"*, 2nd edn, p. 797 states:

> The indefeasible title given on registration is subject to the statutory exceptions set out in Section 340 (of the National Land Code 1955) and also to other general exceptions. First, these include *in personam* claims to which the proprietor is subject arising from a conscientious obligation to which he is a party. Where the proprietor is a volunteer he holds subject to obligations he has created as well as those created by his predecessor in title.

The learned author goes on to state at p. 800:

> The second type of interest to which the registered title is subject, outside indefeasibility, is that under an obligation which is not supported by consideration, but which does bind the proprietor.

From the commentaries aforesaid it would appear that the exceptions to indefeasibility is not confined only to the express statutory exceptions but also to other general exceptions.

The position aforesaid seems to be shared by David Wong in his book *"Tenure and Land Dealing in the Malay States"* wherein in discussing the Federal Court decision of *Ong Chat Pang v. Valiappa Chettiar* [1991] 1 MLJ 224, he commented at p. 339:

> Nonetheless, it is submitted that so far as the Federal Court decision ultimately turned on the failure of C, a registered transferee, in discharging the onus of proving himself to be a *bona fide* purchaser, it would support the general policy contention that the Malaysian Torrens System excludes volunteers from the benefit of indefeasibility of title.

As volunteers appears to be excluded from availing themselves of the benefit on indefeasibility, it is important to ascertain the meaning thereof. The word volunteer as defined in *Osborn's Law Dictionary* refers to "a person who is an object of bounty under a will or settlement as opposed to one who gives valuable consideration."

In this connection it is pertinent to advert to the case of *Runin Pangau v. Gerada (f) Bana* [2000] 4 AMR 445 which bears a lot of similarities with the case at hand and which reaffirms the proposition that binding interests and equities are amongst the general exceptions to the doctrine of indefeasibility through registration.

The claim by the plaintiffs therein which is similar to the claim herein relates to a claim of their father's equitable interest in the land by virtue of an agreement entered into by the plaintiff's and defendant's respective late fathers.

The defendant applied to strike out the plaintiffs' claim and the court in refusing the application held that under the Sarawak Land Code (Cap 81) where the wording of the general exception on indefeasibility is much narrower than the National Land Code, a registered title to land may be made defeasible on grounds other than fraud, such as binding interests and equities and the equity therein which devolved to the plaintiffs was their late father's equitable interest in land by virtue of the agreement.

Upon a careful perusal of the commentaries made by the learned authors aforesaid on the concept of indefeasibility under s. 304 of the National Land Code and the decided cases therein it is my considered view that the interest acquired by the plaintiffs herein pursuant to the deed of sale, survives the death of the defendants' father and the transmission of the land to the defendants is subject to all the equities created by the deed of sale and the defendants are legally bound to honour the equities so created.

This is because of the general rule that rights and liabilities under a contract pass, on the death of a party to the contract, to his personal representatives. In the book *Torrens System in Malaya* by K.S. Das it is stated at p. 359:

> A contract of sale is not abrogated by death, bankruptcy or other disability of the vendor (or purchaser) after the signing of the contract but before completion. The rights and liabilities thereunder vest in the legal representatives ... who are bound no less than the vendor (or purchaser) was bound to perform the contract and by all equities which affected the deceased ...

In *Hj Osman Abu Bakar v. Saiyed Noor* [1952] MLJ 37 the court held that the death of the vendor did not avoid the contract; the legal personal representative of such deceased person was trustee for the contract, and in the absence of fraud, misrepresentations or mistake, was entitled to the land and to possession.

The Learned Justice Thomson (as he then was) stated at p. 39:

> If a purchaser, agrees to buy a piece of land and pays the purchase price then subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake he is entitled to a good title to the land and to possession and the death of the vendor does not abate his rights by one iota.

The Acting Chief Justice Pretheroe at p. 38 remarked:

> As death does not avoid a contract of this nature it seems clear that the same principles apply where a proprietor dies and his representative becomes the registered proprietor. As such he can, in my opinion be compelled to take all steps necessary to give effect to the contract executed by the deceased proprietor.

From the principles aforesaid we can safely deduce that upon the plaintiffs herein paying the full purchase price the deceased became an equitable trustee to the plaintiffs in respect of the portion so purchased and when the land was transmitted to the defendants herein the trust was also transmitted to the defendants.

The devolution of trust is statutorily recognised by the National Land Code 1965 through s. 347(2) thereof which provides:

> Any land, share or interest vested in any person as trustee shall, on its transmission to a personal representative or representatives, continue subject to all trusts to which it was subject at that person's death.

In commenting on s. 347(2) aforesaid the learned author Judith Sihombing had this to say:

> Where the deceased held the land or interest therein subject to any trust, his death does not extinguish the trust. Instead, the personal representatives succeed to the responsibility for the trusts so far as possible to the law of trusts. The subsection extends to express, implied and constructive trusts where such trusts would have been enforceable against the deceased, personally. As the bare trust has now been accepted as arising on the sale of and where a valid contract is in existence, then the personal representatives will succeed to any bare trust binding on the deceased at the time of his death.

On the question of survivorship of trusts an illuminating comment is made by G Raman in his book entitled "*Probate and Administration in Singapore and Malaysia: Law and Practice*" at p. 127:

> A personal representative steps into the shoes of the deceased to carry out whatever contracts the deceased was a party to, except those with a personal element. Contracts with a personal element will be brought to an end upon death. However, where there is no personal element and the right to proceed under the contract accrues to the party entering into the contract with the deceased, the trustee would be answerable for any breaches that may be committed by the failure to comply with the requirement of the contract.

The acknowledgment of interest other than those statutorily excepted is further confirmed by s. 340(4)(b) of the National Land Code 1965 which provides that "Nothing in this section shall prejudice or prevent - the determination of any title or interest by operation of law."

The meaning of the term "operation of law" in the aforesaid section was adverted to by the Federal Court in *Krishnadas Achutan Nair v. Maniyam Samykano* [1997] 1 CLJ 636 which held that:

> Parliament enacted Section 340(4)(b) of the National Land Code for the purpose of dealing with fact patterns that do not full squarely within the other exceptions to indefeasibility that appear in the second sub section to Section 340 of the National Land Code.

The Federal Court in affirming the earlier Federal Court decision of *Ong Chat Pang v. Valiappa Chettiar* [1991] 1 MLJ 224 as accurately reflecting the meaning and effect of s. 340(4)(b) of the Code adopted the views as expressed by Gill FJ (as he then was) stated at p. 1005 thereof:

> The term "operation of law" in subsection (vi), as Das on *Torrens System in Malaya* points out at page 235, is a generic term deliberately used by the legislative to grant relief in case where contractual or conscientious obligations (importing a breach of duty to which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity.

In the light of the aforesaid to summarise the position I agree with the submission of learned counsel for the plaintiffs herein that the defendants herein are volunteers by reason of the registration of the title into their names being through devolution. They are not and cannot be termed as *bona fide* purchaser for value for the reason that no consideration emanates in the devolution. In such a situation their title to the land is defeasible by the equitable interests created and subsisting by the deed of sale and as such their ownership cannot fall within the rule of indefeasibility as envisaged under s. 340(1) of the National Land Code. The interest created is an interest arising by operation of law and recognisable by s. 340(4)(b) of the Code and hence the plaintiffs herein cannot be subjected to prove fraud, misrepresentation, forgery or unlawful acquisition as prescribed by ss. 340(2)(a)(b) and (c) of the Code in enforcing their statutorily recognisable interests as the interests so created is over, and above the statutory exceptions.

Since defeasibility has been established by the general exceptions through the equitable interests created, I shall not go into the respective contentions of the parties regarding the allegation of fraud and the degree of proof thereof in relation to the statutory exceptions of indefeasibility.

In this connection I wish to add that the failure of the plaintiffs to expeditiously enforce their claim does not amount to negligence disentitling them to the reliefs sought - *Torrens System* by SK Das, *Ng Kheng Yeow v. Chuah Ah Foo & Ors* [1987] 2 MLJ 330 at p. 331; *Alfred Templeten & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202.

I now come to the crux of the relief claimed namely the declaration that the plaintiffs be registered as co-proprietors of the land and in determining this question an appraisal of the relevant provisions of the National Land Code is necessitated.

a It is the defendant's contention that the deed of sale even though validly executed is unenforceable and illegal by reason of its contravention of certain specific provisions of the National Land Code and in particular to s. 205 and s. 136 thereof.

b The definition of co-proprietors is to be found in s. 342(1) wherein co-proprietorship is defined as the "holding of alienated land by two or more persons or bodies in undivided shares.

Section 343 stipulates the incidents of co-proprietorship in that there is a presumption of equal shares unless the memorial of registration specifies *c* otherwise. A co-proprietor is further empowered to apply for partition and upon his death the share devolves upon his personal representatives.

Though under s. 214(1) of the National Land Code undivided share of a co-proprietor can be transferred, nevertheless the express provision of s. 205(3) has the effect of prohibiting co-proprietorship of agricultural land of less than *d* two-fifths of an hectare.

Section 205(3) states as follows:

> Subject to sub-section (4), no dealings in respect of any alienated land ... subject to the category "agriculture" or to any condition requiring its use for *e* any agricultural purpose shall be effected if such dealing would have the effect of creating any undivided share of such size that, if the land is to be partitioned in proportion to the several shares, the area of any resulting individual portion would be less than two-fifths of a hectare.

f Though the rigours of prohibition as stipulated in s. 205(3) exists nevertheless it would appear that s. 205(4) provides an escape mechanism for undivided shares of less than 2/5 ths acquired prior to 25 March 1985 in that if a co-proprietor of agricultural land holds less than 2/5 ths of an undivided share prior to 25 March 1985 dealings on his undivided share may still be effected.

g The requirements of what constitutes dealings is spelt out by s. 206 wherein every dealing under the Act is to be effected by an instrument complying with the requirements of s. 207 to 212 which *inter alia* stipulates that the instrument must be in the statutory form and must amongst others specify the shares to be held by the co-proprietors and it must be executed, attested and registered.

h However upon a careful appraisal of s. 205, it is my considered view that though there appears to be an escape mechanism in s. 205(4) nevertheless a proviso was added to the said sub-section by the National Land Code Amendment Act 1992 to the effect that any such dealings must not only be in respect of the whole land or undivided share, but must also be in favour *i* of one person or one or more co-proprietors of the land.

By reason of the proviso, the exemption provided by sub-s. (4) of s. 205 is nullified and the prohibition imposed by sub-s. (3) thereof extends to all agricultural land of less than 2/5ths of an hectare regardless of the date of acquisition.

It is my judgment that the sum total of the prohibitory provisions of s. 205(3) and 205(4) would have the effect of prohibiting the plaintiffs from the relief sought of effecting registration of themselves as co-proprietors of the land herein which is categorised as agricultural land.

This brings me to the question as to what is the effect of the prohibitory provision of s. 205 of the National Land Code on the deed of sale - does it mean that the statutory bar in getting themselves registered as co-proprietors would leave the plaintiffs herein without any remedy whatsoever? Does the rigours of s. 205 National Land Code prevent this court from giving effect and preserving the equitable interest of the plaintiffs? In my judgment the interest of justice dictates that the court should and must come to the aid of the plaintiffs herein more so in the light of the findings of the equitable interests by way of trusts created and subsisting under the deed of sale.

I hereby rule that the defendants herein do hold the land subject to the constructive trusts created in favour of the plaintiffs pursuant to the terms of the deed of sale and irrevocable power of attorney and pursuant to s. 417 of the National Land Code the registrar of titles and/or the Land Administrator as the case may be do cause an endorsement to be entered on the register of titles of the trust aforesaid in favour of the plaintiffs herein and the costs of the action herein be taxed and be paid by the defendants to the plaintiffs.